

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****Office of the Assistant Secretary for Public and Indian Housing****24 CFR Parts 882, 887, 982, and 983**

[Docket No. FR-2294-N-03]

RIN 2577-AB14

**Section 8 Certificate and Voucher Programs Conforming Rule; Announcement of Effective Date and OMB Approval Number****AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.**ACTION:** Announcement of effective date and OMB approval number to final rule.

**SUMMARY:** On July 3, 1995 (60 FR 34660), the Department published in the *Federal Register*, a final rule that combined and conformed rules for tenant-based rental assistance under the rental certificate and the rental voucher programs. The rule also amended requirements for project-based assistance under the rental certificate program.

The effective date section of that rule indicated that before the rule could become effective, the information collections contained in the rule must be reviewed and approved by the Office of Management and Budget (OMB), as required under the Paperwork Reduction Act of 1980. Since OMB has completed this process, the purpose of this document is to announce the effective date of the final rule, and also to announce the OMB approval number.

**EFFECTIVE DATE:** October 2, 1995.**FOR FURTHER INFORMATION CONTACT:**

Madeline Hastings, Director, Rental Assistance Division, Room 4204, Telephone numbers (202) 708-2841 (voice); (202) 708-0850 (TDD). (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:** On February 24, 1993 (58 FR 11292), HUD published a comprehensive proposed rule to combine and conform the rules for tenant-based Section 8 rental assistance under the certificate and voucher programs. The matrix, contained in the preamble of that proposed rule (60 FR 11318), identified information collection requirements in §§ 982.53, 982.102, 982.151, 982.302, 982.305, 982.404, and 982.406.

The July 3, 1995 final rule contained additional information requirements from those mentioned above in §§ 982.52, 982.54, 982.153, 982.155, 982.156, 982.157, 982.158, 982.159, 982.160, 982.206, 982.301, 982.303,

982.304, 982.307, 982.310, 982.352, 982.403, 982.452, 982.455, 982.551, 982.552, 982.554, 982.555, 983.3, 983.12, 983.51, 983.52, 983.54, 983.55, 983.57, 983.103, 983.104, 983.151, 983.202, 983.203, 983.205, and 983.207.

A proposed information collection notice published simultaneously in the *Federal Register* on July 3, 1995 (60 FR 34729), with the final rule identified the numbers of the Forms to be used for submission of information to the Department.

This document announces the effective date of the July 3, 1995 final rule, and announces the approval number received from the Office of Management and Budget for these programs.

**List of Subjects****24 CFR Part 882**

Grant programs—housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

**24 CFR Part 887**

Grant programs—housing and community development, Rent subsidies, Reporting and recording requirements.

**24 CFR Part 982**

Grant programs—housing and community development, Housing, Rent subsidies, Reporting and recordkeeping requirements.

**24 CFR Part 983**

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, and under the Secretary's authority of 42 U.S.C. 3535(d), the final rule, "Section 8 Certificate and Voucher Programs Conforming Rule", published July 3, 1995 (60 FR 34660) that amended 24 CFR Parts 882, 887, 982, and 983, is effective October 2, 1995. 24 CFR Parts 982 and 983 are further amended by adding the OMB approval number, as follows:

**PART 982—SECTION 8 TENANT-BASED ASSISTANCE: UNIFIED RULE FOR TENANT-BASED ASSISTANCE UNDER THE SECTION 8 RENTAL CERTIFICATE PROGRAM AND THE SECTION 8 RENTAL VOUCHER PROGRAM**

1. The authority citation for part 982 continues to read as follows:

**Authority:** 42 U.S.C. 1437f and 3535(d).

§§ 982.52–982.54, 982.102, 982.151, 982.153, 982.155–982.160, 982.206, 982.301–982.305, 982.307, 982.310, 982.352, 982.403–982.404, 982.406, 982.452, 982.455, 982.551–982.552, 982.554–982.555 [Amended]

2. Sections 982.52, 982.53, 982.54, 982.102, 982.151, 982.153, 982.155, 982.156, 982.157, 982.158, 982.159, 982.160, 982.206, 982.301, 982.302, 982.303, 982.304, 982.305, 982.307, 982.310, 982.352, 982.403, 982.404, 982.406, 982.452, 982.455, 982.551, 982.552, 982.554, and 982.555 are amended by adding at the end of each section the phrase, "(Approved by the Office of Management and Budget under control number 2577-0169)".

**PART 983—SECTION 8 PROJECT-BASED CERTIFICATE PROGRAM**

3. The authority citation for part 983 continues to read as follows:

**Authority:** 42 U.S.C. 1437f and 3535(d).

§§ 983.3, 983.12, 983.51–983.52, 983.54–983.55, 983.57, 983.103–983.104, 983.151, 983.202–983.203, 983.205, 983.207 [Amended]

4. Sections 983.3, 983.12, 983.51, 983.52, 983.54, 983.55, 983.57, 983.103, 983.104, 983.151, 983.202, 983.203, 983.205, and 983.207 are amended by adding at the end of each section the phrase, "(Approved by the Office of Management and Budget under control number 2577-0169)".

Dated: August 28, 1995.

**Joseph Shuldiner,**

*Assistant Secretary for the Office of Public and Indian Housing.*

[FR Doc. 95-21719 Filed 8-31-95; 8:45 am]

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**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 8617]

RIN 1545-AS58; 1545-AT13

**Accuracy-Related Penalty**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations implementing changes to the accuracy-related penalty under section 6662 of the Internal Revenue Code of 1986 that were made by section 13251 of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) and Title VII of the Uruguay Round Agreements Act, implementing the Uruguay Round of the General Agreement on Tariffs and Trade

(the GATT Act). The final regulations also provide guidance as to when a taxpayer may rely upon the advice of others as evidence of reasonable cause and good faith within the meaning of section 6664(c) for purposes of avoiding the accuracy-related penalty of section 6662, and as to what constitutes reasonable cause and good faith within the meaning of section 6664(c) as applicable to the substantial understatement penalty of section 6662(b)(2) with respect to tax shelter items of a corporation. These regulations affect taxpayers subject to the accuracy-related penalty.

**EFFECTIVE DATE:** These regulations are effective September 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Rochelle L. Hodes, (202) 622- 6232 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

As part of OBRA 1993, Congress made certain changes to the accuracy-related penalty. These changes eliminated the disclosure exception for the negligence penalty (section 6662(b)(1) of the Internal Revenue Code (Code)) and raised the disclosure standard for purposes of the penalties for disregard of rules or regulations (section 6662(b)(1) of the Code) and substantial understatement of income tax (section 6662(b)(2) of the Code) from "not frivolous" to "reasonable basis."

On March 17, 1994, temporary regulations (TD 8533) reflecting changes to the accuracy-related penalty made by OBRA 1993 were published in the **Federal Register** (59 FR 12547). A notice of proposed rulemaking (IA-78-93) relating to the temporary regulations was published in the **Federal Register** for the same day (59 FR 12563). On March 30, 1994, a correction to the temporary regulations was published in the **Federal Register** (59 FR 14749) clarifying language in § 1.6662-7T(a)(2) of the temporary regulations. The same day a correction to the notice of proposed rulemaking was published in the **Federal Register** (59 FR 14810) correcting "RIN 1545-AS58" to read "RIN 1545-AS62" and other administrative matters and clarifying language in §§ 1.6662-2(d)(2) and 1.6662-7(a)(2) of the proposed regulations.

Section 744 of the GATT Act made further changes to the accuracy-related penalty. For corporate taxpayers, the GATT Act amended section 6662(d) of the Code to eliminate the exception to the substantial understatement penalty regarding tax shelter items for which the taxpayer had substantial authority and

reasonably believed that its treatment was more likely than not the proper treatment. The legislative history of the GATT Act states that "the standards applicable to corporate tax shelters are tightened" and "in no instance [will] this modification result in a penalty not being imposed where a penalty would have been imposed under prior law." S. Rep. No. 412, 103d Cong., 2d Sess. 165 (1994); H.R. Rep. No. 826, 103d Cong., 2d Sess. 198-99 (1994).

On January 4, 1995, a notice of proposed rulemaking (IA-55-94) was published in the **Federal Register** (60 FR 406) implementing the changes made by the GATT Act and providing guidance with regard to reliance upon the advice of others as evidence of reasonable cause and good faith within the meaning of section 6664(c) of the Code for purposes of avoiding the accuracy-related penalty of section 6662, and what constitutes reasonable cause and good faith within the meaning of section 6664(c) as it applies to the substantial understatement penalty of section 6662(b)(2) with respect to tax shelter items of a corporation.

Written comments responding to these notices were received. A public hearing on the notices regarding changes made by OBRA 1993 was held on July 12, 1994. A public hearing on the notice regarding changes made by the GATT Act was held on April 28, 1995. After consideration of all the comments, the proposed regulations under sections 6662 and 6664 of the Code are adopted as revised by this Treasury decision.

**Explanation of Provisions**

*Reasonable Basis Standard for Disclosure*

With respect to the reasonable basis standard, the final regulations adopt the proposed regulations without substantive change. The regulations provide that the reasonable basis standard is "significantly higher than the not frivolous standard applicable to preparers under section 6694." In the preamble to the proposed regulations, Treasury requested comments on any additional guidance as to the reasonable basis standard for purposes of the negligence, disregard of rules or regulations, and substantial understatement penalties. Several commentators recommended adopting as the definition of reasonable basis the description that existed in § 1.6662-4(d)(2) of the regulations prior to amendment by these final regulations. Other commentators recommended equating the reasonable basis standard

with the negligence standard and the realistic possibility of success standard, taking into account the relative knowledge and experience of the taxpayer. The IRS and Treasury are continuing to consider these comments in connection with a separate project to publish a notice of proposed rulemaking providing further guidance as to the reasonable basis standard. Treasury and the IRS invite additional comments and suggestions regarding this project.

*Reliance on Tax Advisor*

Under sections 6662 and 6664, and applicable regulations, a taxpayer's good faith reliance on the advice (including an opinion) of a professional tax advisor will generally be taken into account for purposes of determining whether the taxpayer will be subject to an accuracy-related penalty. See, e.g., §§ 1.6662-4(g)(4)(ii) and 1.6664-4(b). The proposed regulations clarify when a taxpayer may be considered to have reasonably relied in good faith upon advice (including an opinion provided by a professional tax advisor), for purposes of sections 6662 and 6664. In general, § 1.6664-4(c) of the proposed regulations requires advice to be based on all material facts (including, for example, the taxpayer's purposes for entering into a transaction) and to relate applicable law to such facts in reaching its conclusion. The advice must not be based upon unreasonable factual or legal assumptions (including assumptions as to future events), nor unreasonably rely on the representations, findings or agreements of the taxpayer or any other person. The proposed regulations also indicate that reliance may not be reasonable or in good faith if the taxpayer knew, or should have known, that the advisor lacked knowledge in the relevant aspects of Federal tax law.

Several commentators recommended changes to these provisions of the proposed regulations. For example, one commentator suggested eliminating language in § 1.6664-4(c)(1) of the proposed regulations that reliance on advice may not be reasonable and in good faith if the taxpayer knew, or should have known, that the advisor lacked knowledge in the relevant aspects of Federal tax law.

The final regulations do not adopt this suggestion. In requiring that reliance on advice must be reasonable in light of all of the facts and circumstances, the final regulations do not depart from prior law. In most situations it will generally be reasonable for a taxpayer to conclude that an attorney, an accountant, or an enrolled agent is qualified to give advice on Federal tax law.

Another commentator suggested eliminating the requirements that advice must be based on all material facts and reasonable factual and legal assumptions. The commentator stated that taxpayers are not in a position to determine what facts are material, particularly in complex transactions, nor are they in a position to determine whether the advisor based the opinion on material facts and reasonable factual and legal assumptions. An additional commentator requested guidance to distinguish the term *pertinent* as it is used throughout the regulations and the term *material* as it is used in § 1.6664-4(c) of the proposed regulations.

In response to these comments, and in order to resolve confusion, the final regulations provide that advice must be based upon all pertinent facts and circumstances and the law as it relates to those facts and circumstances. As used in this context, *pertinent* is intended to have the same meaning as it has in § 1.6662-4(g)(4)(ii), which provides that a taxpayer may satisfy the reasonable belief requirement of section 6662(d)(2)(C)(i) through reliance on an advisor's analysis of pertinent facts and authorities. To clarify that separate rules apply to taxpayers and advisors, the final regulations have also been revised to include a cross-reference to the preparer penalties under §§ 1.6694-1 through 1.6694-3 and Circular 230 (contained in 31 CFR part 10).

Another commentator recommended eliminating, or in the alternative revising and clarifying, the requirement that advice take into account the taxpayer's purposes for entering into a transaction or structuring a transaction in a particular manner. The final regulations do not adopt this recommendation. It is appropriate to consider a taxpayer's reasons for structuring a transaction in a particular manner in determining whether the taxpayer acted in good faith in its tax return treatment of items from the transaction.

#### *Reasonable Cause for Tax Shelter Items of a Corporation*

The proposed regulations provide that a corporation's legal justification may be taken into account, as appropriate, in establishing that the corporation acted with reasonable cause and in good faith in its treatment of a tax shelter item only if there is substantial authority for the treatment of the item and the corporation reasonably believes in good faith that such treatment is more likely than not the proper treatment. Under the proposed regulations, satisfaction of the substantial authority and reasonable belief criteria is an important factor to

be considered in determining whether the taxpayer acted with reasonable cause and in good faith, but is not necessarily dispositive. The proposed regulations also provide that facts and circumstances other than a corporation's legal justification may be taken into account, as appropriate, in determining whether it acted with reasonable cause and in good faith, regardless of whether the substantial authority and reasonable belief requirements are satisfied.

One commentator urged removal of the special reasonable cause standard for corporate tax shelter items under the proposed regulations. According to the commentator, there is no authority in section 6664 or its legislative history for a reasonable cause standard for tax shelter items of corporate taxpayers that differs from the standard for noncorporate taxpayers.

Other commentators recommended revising the legal justification test for determining reasonable cause. Particularly, these commentators recommended removing the objective requirement that substantial authority be present for the taxpayer's position (the authority requirement). Alternatively, one commentator suggested making the legal justification test a "safe harbor." Under this alternative, a taxpayer that satisfies the authority requirement and the belief requirement under proposed § 1.6664-4(e)(2) would be treated as having acted with reasonable cause and in good faith.

The final regulations do not adopt these suggestions. Treasury and the IRS continue to believe that the regulations, including the authority requirement, properly implement the statute and Congressional intent.

Satisfaction of the minimum requirements under the legal justification test is an important factor to be considered in determining whether a corporate taxpayer acted with reasonable cause and in good faith, but is not necessarily dispositive. For example, depending on the circumstances, satisfaction of the minimum requirements may not be dispositive if the taxpayer's participation in the tax shelter lacked significant business purpose, if the taxpayer claimed tax benefits that are unreasonable in comparison to the taxpayer's investment in the tax shelter, or if the taxpayer agreed with the organizer or promoter of the tax shelter that the taxpayer would protect the confidentiality of the tax aspects of the structure of the tax shelter. In addition, a taxpayer that does not satisfy the authority requirement may nonetheless demonstrate that it acted with reasonable cause and in good faith

based on facts and circumstances unrelated to its legal justification (the other factors test).

Although several commentators requested additional guidance with regard to the other factors test, they provided no examples of factors (other than factors related to legal justification) that they would like to be included in the final regulations. The suggested factors were not adopted because legal justification is not relevant to the other factors test. While the final regulations do not provide additional guidance in this area, Treasury and the IRS continue to welcome comments on the issue.

#### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notices of proposed rulemaking preceding these regulations were submitted to the Small Business Administration for comment on their impact on small business.

#### **Drafting Information**

The principal authors of these regulations are Rochelle L. Hodes, Office of Assistant Chief Counsel (Income Tax and Accounting), and David Meyer formerly of that office. However, other personnel from the IRS and Treasury Department participated in their development.

#### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

#### **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

#### **PART 1—INCOME TAXES**

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

**Par. 2.** Section 1.6662-0 is amended by:

1. Revising the introductory language.
2. Revising the entry for § 1.6662-2(d) and adding entries for (d) (1), (2), and (3).

3. Revising the entries for §§ 1.6662-3(b)(3) and 1.6662-4(g).

4. Adding an entry for § 1.6662-7.

5. Removing the entry for § 1.6662-7T.

The additions and revisions read as follows:

#### **§ 1.6662-0 Table of contents.**

This section lists the captions that appear in §§ 1.6662-1 through 1.6662-7.

\* \* \* \* \*

#### **§ 1.6662-2 Accuracy related penalty.**

\* \* \* \* \*

(d) Effective dates.

(1) Returns due before January 1, 1994.

(2) Returns due after December 31, 1993.

(3) Special rules for tax shelter items.

\* \* \* \* \*

#### **§ 1.6662-3 Negligence or disregard of rules or regulations.**

\* \* \* \* \*

(b) \* \* \*

(3) Reasonable basis.

(i) In general [Reserved].

(ii) Relationship to other standards.

\* \* \* \* \*

#### **§ 1.6662-4 Substantial understatement of income tax.**

\* \* \* \* \*

(g) Items relating to tax shelters.

(1) In general.

(i) Noncorporate taxpayers.

(ii) Corporate taxpayers.

(A) In general.

(B) Special rule for transactions occurring prior to December 9, 1994.

(iii) Disclosure irrelevant.

(iv) Cross-reference.

(2) Tax shelter.

(i) In general.

(ii) Principal purpose.

(3) Tax shelter item.

(4) Reasonable belief.

(i) In general.

(ii) Facts and circumstances; reliance on professional tax advisor.

(5) Pass-through entities.

\* \* \* \* \*

#### **§ 1.6662-7 Omnibus Budget Reconciliation Act of 1993 changes to the accuracy-related penalty.**

(a) Scope.

(b) No disclosure exception for negligence penalty.

(c) Disclosure standard for other penalties is reasonable basis.

(d) Definition of reasonable basis.

(1) In general [Reserved].

(2) Relationship to other standards.

**Par. 3.** In § 1.6662-1, the second and third sentences of the concluding text are revised to read as follows:

#### **§ 1.6662-1 Overview of the accuracy-related penalty.**

\* \* \* \* \*

\* \* \* The penalties for disregard of rules or regulations and for a substantial

understatement of income tax may be avoided by adequately disclosing certain information as provided in § 1.6662-3(c) and §§ 1.6662-4(e) and (f), respectively. The penalties for negligence and for a substantial (or gross) valuation misstatement under chapter 1 may not be avoided by disclosure. \* \* \*

**Par. 4.** Section 1.6662-2 is amended by:

1. Revising the heading of paragraph (d), redesignating the text of paragraph (d) following the heading as paragraph (d)(1), adding a new heading for newly designated paragraph (d)(1), and revising the first and second sentences of newly redesignated paragraph (d)(1).

2. Adding new paragraphs (d)(2) and (3).

The additions and revisions read as follows:

#### **§ 1.6662-2 Accuracy-related penalty.**

\* \* \* \* \*

(d) *Effective dates*—(1) *Returns due before January 1, 1994.* Section 1.6662-3(c) and §§ 1.6662-4 (e) and (f) (relating to methods of making adequate disclosure) (as contained in 26 CFR part 1 revised April 1, 1995) apply to returns the due date of which (determined without regard to extensions of time for filing) is after December 31, 1991, but before January 1, 1994. Except as provided in the preceding sentence and in paragraphs (d)(2) and (3) of this section, §§ 1.6662-1 through 1.6662-5 apply to returns the due date of which (determined without regard to extensions of time for filing) is after December 31, 1989, but before January 1, 1994. \* \* \*

(2) *Returns due after December 31, 1993.* Except as provided in paragraph (d)(3) and the last sentence of this paragraph (d)(2), the provisions of §§ 1.6662-1 through 1.6662-4 and § 1.6662-7 (as revised to reflect the changes made to the accuracy-related penalty by the Omnibus Budget Reconciliation Act of 1993) and of § 1.6662-5 apply to returns the due date of which (determined without regard to extensions of time for filing) is after December 31, 1993. These changes include raising the disclosure standard for the penalties for disregarding rules or regulations and for a substantial understatement of income tax from not frivolous to reasonable basis, eliminating the disclosure exception for the negligence penalty, and providing guidance on the meaning of reasonable basis. The Omnibus Budget Reconciliation Act of 1993 changes relating to the penalties for negligence or disregard of rules or regulations will not apply to returns (including qualified

amended returns) that are filed on or before March 14, 1994, but the provisions of §§ 1.6662-1 through 1.6662-3 (as contained in 26 CFR part 1 revised April 1, 1995) relating to those penalties will apply to such returns.

(3) *Special rules for tax shelter items.* Sections 1.6662-4(g)(1) and 1.6662-4(g)(4) apply to returns the due date of which (determined without regard to extensions of time for filing) is after September 1, 1995. Except as provided in the last sentence of this paragraph (d)(3), §§ 1.6662-4(g)(1) and 1.6662-4(g)(4) (as contained in 26 CFR part 1 revised April 1, 1995) apply to returns the due date of which (determined without regard to extensions of time for filing) is on or before September 1, 1995 and after December 31, 1989. For transactions occurring after December 8, 1994, §§ 1.6662-4(g)(1) and 1.6662-4(g)(2) (as contained in 26 CFR part 1 revised April 1, 1995) are applied taking into account the changes made to section 6662(d)(2)(C) (relating to the substantial understatement penalty for tax shelter items of corporations) by section 744 of Title VII of the Uruguay Round Agreements Act, Pub. L. 103-465 (108 Stat. 4809).

**Par. 5.** Section 1.6662-3 is amended by:

1. Revising the second sentence of paragraph (a).

2. Revising paragraph (b)(3).

3. Revising paragraphs (c)(1) and (2).

The revisions read as follows:

#### **§ 1.6662-3 Negligence or disregard of rules or regulations.**

(a) \* \* \* The penalty for disregarding rules or regulations does not apply, however, if the requirements of § 1.6662-3(c)(1) are satisfied and the position in question is adequately disclosed as provided in § 1.6662-3(c)(2), or to the extent that the reasonable cause and good faith exception to this penalty set forth in § 1.6664-4 applies. \* \* \*

(b) \* \* \*

(3) *Reasonable basis*—(i) *In general.* [Reserved].

(ii) *Relationship to other standards.*

The reasonable basis standard is significantly higher than the not frivolous standard applicable to preparers under section 6694 and defined in § 1.6694-2(c)(2).

(c) \* \* \* (1) *In general.* No penalty under section 6662(b)(1) may be imposed on any portion of an underpayment that is attributable to a position contrary to a rule or regulation if the position is disclosed in accordance with the rules of paragraph (c)(2) of this section and, in case of a position contrary to a regulation, the

position represents a good faith challenge to the validity of the regulation. This disclosure exception does not apply, however, in the case of a position that does not have a reasonable basis or where the taxpayer fails to keep adequate books and records or to substantiate items properly.

(2) *Method of disclosure.* Disclosure is adequate for purposes of the penalty for disregarding rules or regulations if made in accordance with the provisions of §§ 1.6662-4(f)(1), (3), (4), and (5), which permit disclosure on a properly completed and filed Form 8275 or 8275-R, as appropriate. In addition, the statutory or regulatory provision or ruling in question must be adequately identified on the Form 8275 or 8275-R, as appropriate. The provisions of § 1.6662-4(f)(2), which permit disclosure in accordance with an annual revenue procedure for purposes of the substantial understatement penalty, do not apply for purposes of this section.

\* \* \* \* \*

**Par. 6.** Section 1.6662-4 is amended by:

1. Removing the third sentence in paragraph (d)(2).
2. Revising paragraph (e)(2).
3. Revising paragraphs (g)(1), (g)(4), and (g)(5).

The revisions read as follows:

**§ 1.6662-4 Substantial understatement of income tax.**

\* \* \* \* \*

(e) \* \* \*

(2) *Circumstances where disclosure will not have an effect.* The rules of paragraph (e)(1) of this section do not apply where the item or position on the return—

- (i) Does not have a reasonable basis (as defined in § 1.6662-3(b)(3));
- (ii) Is attributable to a tax shelter (as defined in section 6662(d)(2)(C)(iii) and paragraph (g)(2) of this section); or
- (iii) Is not properly substantiated, or the taxpayer failed to keep adequate books and records with respect to the item or position.

\* \* \* \* \*

(g) *Items relating to tax shelters—(1) In general—(i) Noncorporate taxpayers.* Tax shelter items (as defined in paragraph (g)(3) of this section) of a taxpayer other than a corporation are treated for purposes of this section as if such items were shown properly on the return for a taxable year in computing the amount of tax shown on the return, and thus the tax attributable to such items is not included in the understatement for the year, if—

(A) There is substantial authority (as provided in paragraph (d) of this

section) for the tax treatment of that item; and

(B) The taxpayer reasonably believed at the time the return was filed that the tax treatment of that item was more likely than not the proper treatment.

(ii) *Corporate taxpayers—(A) In general.* Except as provided in paragraph (g)(1)(ii)(B) of this section, all tax shelter items (as defined in paragraph (g)(3) of this section) of a corporation are taken into account in computing the amount of any understatement.

(B) *Special rule for transactions occurring prior to December 9, 1994.* The tax shelter items of a corporation arising in connection with transactions occurring prior to December 9, 1994 are treated for purposes of this section as if such items were shown properly on the return if the requirements of paragraph (g)(1)(i) are satisfied with respect to such items.

(iii) *Disclosure irrelevant.* Disclosure made with respect to a tax shelter item of either a corporate or noncorporate taxpayer does not affect the amount of an understatement.

(iv) *Cross-reference.* See § 1.6664-4(e) for certain rules regarding the availability of the reasonable cause and good faith exception to the substantial understatement penalty with respect to tax shelter items of corporations.

\* \* \* \* \*

(4) *Reasonable belief—(i) In general.*

For purposes of section 6662(d) and paragraph (g)(1)(i)(B) of this section (pertaining to tax shelter items of noncorporate taxpayers), a taxpayer is considered reasonably to believe that the tax treatment of an item is more likely than not the proper tax treatment if (without taking into account the possibility that a return will not be audited, that an issue will not be raised on audit, or that an issue will be settled)—

(A) The taxpayer analyzes the pertinent facts and authorities in the manner described in paragraph (d)(3)(ii) of this section, and in reliance upon that analysis, reasonably concludes in good faith that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged by the Internal Revenue Service; or

(B) The taxpayer reasonably relies in good faith on the opinion of a professional tax advisor, if the opinion is based on the tax advisor's analysis of the pertinent facts and authorities in the manner described in paragraph (d)(3)(ii) of this section and unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be

upheld if challenged by the Internal Revenue Service.

(ii) *Facts and circumstances; reliance on professional tax advisor.* All facts and circumstances must be taken into account in determining whether a taxpayer satisfies the requirements of paragraph (g)(4)(i) of this section. However, in no event will a taxpayer be considered to have reasonably relied in good faith on the opinion of a professional tax advisor for purposes of paragraph (g)(4)(i)(B) of this section unless the requirements of § 1.6664-4(c)(1) are met. The fact that the requirements of § 1.6664-4(c)(1) are satisfied will not necessarily establish that the taxpayer reasonably relied on the opinion in good faith. For example, reliance may not be reasonable or in good faith if the taxpayer knew, or should have known, that the advisor lacked knowledge in the relevant aspects of Federal tax law.

(5) *Pass-through entities.* In the case of tax shelter items attributable to a pass-through entity, the actions described in paragraphs (g)(4)(i)(A) and (B) of this section, if taken by the entity, are deemed to have been taken by the taxpayer and are considered in determining whether the taxpayer reasonably believed that the tax treatment of an item was more likely than not the proper tax treatment.

**Par. 7.** Section 1.6662-7 is added to read as follows:

**§ 1.6662-7 Omnibus Budget Reconciliation Act of 1993 changes to the accuracy-related penalty.**

(a) *Scope.* The Omnibus Budget Reconciliation Act of 1993 made certain changes to the accuracy-related penalty in section 6662. This section provides rules reflecting those changes.

(b) *No disclosure exception for negligence penalty.* The penalty for negligence in section 6662(b)(1) may not be avoided by disclosure of a return position.

(c) *Disclosure standard for other penalties is reasonable basis.* The penalties for disregarding rules or regulations in section 6662(b)(1) and for a substantial understatement of income tax in section 6662(b)(2) may be avoided by adequate disclosure of a return position only if the position has at least a reasonable basis. See § 1.6662-3(c) and §§ 1.6662-4(e) and (f) for other applicable disclosure rules.

(d) *Definition of reasonable basis—(1) In general.* [Reserved].

(2) *Relationship to other standards.* The reasonable basis standard is significantly higher than the not frivolous standard applicable to

preparers under section 6694 and defined in § 1.6694-2(c)(2).

#### § 1.6662-7T [Removed]

**Par. 8.** Section 1.6662-7T is removed.

**Par. 9.** Section 1.6664-0 is amended by revising the entries for §§ 1.6664-1(b) and 1.6664-4 to read as follows:

#### § 1.6664-0 Table of contents.

\* \* \* \* \*

#### § 1.6664-1 Accuracy-related and fraud penalties; definitions and special rules.

\* \* \* \* \*

(b) Effective date.

(1) In general.

(2) Reasonable cause and good faith exception to section 6662 penalties.

\* \* \* \* \*

#### § 1.6664-4 Reasonable cause and good faith exception to section 6662 penalties.

(a) In general.

(b) Facts and circumstances taken into account.

(1) In general.

(2) Examples.

(c) Reliance on opinion or advice.

(1) Fact and circumstances; minimum requirements.

(i) All facts and circumstances considered.

(ii) No unreasonable assumptions.

(iii) Law is related to actual facts.

(2) Definitions.

(i) Advice.

(ii) Material.

(3) Cross-reference.

(d) Pass-through items.

(e) Special rules for substantial understatement penalty attributable to tax shelter items of corporations.

(1) In general; facts and circumstances.

(2) Reasonable cause based on legal justification.

(i) Minimum requirements.

(A) Authority requirement.

(B) Belief requirement.

(ii) Legal justification defined.

(3) Minimum requirements not dispositive.

(4) Other factors.

(f) Transactions between persons described in section 482 and net section 482 transfer price adjustments. [Reserved]

(g) Valuation misstatements of charitable deduction property.

(1) In general.

(2) Definitions.

(i) Charitable deduction property.

(ii) Qualified appraisal.

(iii) Qualified appraiser.

\* \* \* \* \*

**Par. 10.** Section 1.6664-1 is amended by revising paragraph (b) to read as follows:

#### § 1.6664-1 Accuracy-related and fraud penalties; definitions and special rules.

\* \* \* \* \*

(b) *Effective date*—(1) *In general.* Sections 1.6664-1 through 1.6664-3 apply to returns the due date of which (determined without regard to extensions of time for filing) is after December 31, 1989.

#### (2) *Reasonable cause and good faith exception to section 6662 penalties.*

Section 1.6664-4 applies to returns the due date of which (determined without regard to extensions of time for filing) is after September 1, 1995. Except as provided in the last sentence of this paragraph (b)(2), § 1.6664-4 (as contained in 26 CFR part 1 revised April 1, 1995) applies to returns the due date of which (determined without regard to extensions of time for filing) is on or before September 1, 1995 and after December 31, 1989. For transactions occurring after December 8, 1994, § 1.6664-4 (as contained in 26 CFR part 1 revised April 1, 1995) is applied taking into account the changes made to section 6662(d)(2)(C) (relating to the substantial understatement penalty for tax shelter items of corporations) by section 744 of Title VII of the Uruguay Round Agreements Act, Pub. L. 103-465 (108 Stat. 4809).

**Par. 11.** Section 1.6664-4 is amended by:

1. Revising the last sentence of paragraph (a).

2. Revising paragraph (b)(1).

3. Revising the introductory language of paragraph (b)(2) and *Example 1*.

4. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (f), and (g), respectively.

5. Revising newly designated paragraph (d).

6. Adding new paragraphs (c) and (e). The additions and revisions read as follows:

#### § 1.6664-4 Reasonable cause and good faith exception to section 6662 penalties.

(a) \* \* \* Rules for determining whether the reasonable cause and good faith exception applies are set forth in paragraphs (b) through (g) of this section.

(b) *Facts and circumstances taken into account*—(1) *In general.* The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. (See paragraph (e) of this section for certain rules relating to a substantial understatement penalty attributable to tax shelter items of corporations.) Generally, the most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability. Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer. An isolated computational or transcriptional error

generally is not inconsistent with reasonable cause and good faith. Reliance on an information return or on the advice of a professional tax advisor or an appraiser does not necessarily demonstrate reasonable cause and good faith. Similarly, reasonable cause and good faith is not necessarily indicated by reliance on facts that, unknown to the taxpayer, are incorrect. Reliance on an information return, professional advice, or other facts, however, constitutes reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith. (See paragraph (c) of this section for certain rules relating to reliance on the advice of others.) For example, reliance on erroneous information (such as an error relating to the cost or adjusted basis of property, the date property was placed in service, or the amount of opening or closing inventory) inadvertently included in data compiled by the various divisions of a multidivisional corporation or in financial books and records prepared by those divisions generally indicates reasonable cause and good faith, provided the corporation employed internal controls and procedures, reasonable under the circumstances, that were designed to identify such factual errors. Reasonable cause and good faith ordinarily is not indicated by the mere fact that there is an appraisal of the value of property. Other factors to consider include the methodology and assumptions underlying the appraisal, the appraised value, the relationship between appraised value and purchase price, the circumstances under which the appraisal was obtained, and the appraiser's relationship to the taxpayer or to the activity in which the property is used. (See paragraph (g) of this section for certain rules relating to appraisals for charitable deduction property.) A taxpayer's reliance on erroneous information reported on a Form W-2, Form 1099, or other information return indicates reasonable cause and good faith, provided the taxpayer did not know or have reason to know that the information was incorrect. Generally, a taxpayer knows, or has reason to know, that the information on an information return is incorrect if such information is inconsistent with other information reported or otherwise furnished to the taxpayer, or with the taxpayer's knowledge of the transaction. This knowledge includes, for example, the taxpayer's knowledge of the terms of his employment relationship or of the rate of return on a payor's obligation.

(2) *Examples.* The following examples illustrate this paragraph (b). They do not involve tax shelter items. (See paragraph (e) of this section for certain rules relating to the substantial understatement penalty attributable to the tax shelter items of corporations.)

*Example 1.* A, an individual calendar year taxpayer, engages B, a professional tax advisor, to give A advice concerning the deductibility of certain state and local taxes. A provides B with full details concerning the taxes at issue. B advises A that the taxes are fully deductible. A, in preparing his own tax return, claims a deduction for the taxes. Absent other facts, and assuming the facts and circumstances surrounding B's advice and A's reliance on such advice satisfy the requirements of paragraph (c) of this section, A is considered to have demonstrated good faith by seeking the advice of a professional tax advisor, and to have shown reasonable cause for any underpayment attributable to the deduction claimed for the taxes. However, if A had sought advice from someone that A knew, or should have known, lacked knowledge in the relevant aspects of Federal tax law, or if other facts demonstrate that A failed to act reasonably or in good faith, A would not be considered to have shown reasonable cause or to have acted in good faith.

\* \* \* \* \*

(c) *Reliance on opinion or advice—(1) Facts and circumstances; minimum requirements.* All facts and circumstances must be taken into account in determining whether a taxpayer has reasonably relied in good faith on advice (including the opinion of a professional tax advisor) as to the treatment of the taxpayer (or any entity, plan, or arrangement) under Federal tax law. However, in no event will a taxpayer be considered to have reasonably relied in good faith on advice unless the requirements of this paragraph (c)(1) are satisfied. The fact that these requirements are satisfied will not necessarily establish that the taxpayer reasonably relied on the advice (including the opinion of a professional tax advisor) in good faith. For example, reliance may not be reasonable or in good faith if the taxpayer knew, or should have known, that the advisor lacked knowledge in the relevant aspects of Federal tax law.

(i) *All facts and circumstances considered.* The advice must be based upon all pertinent facts and circumstances and the law as it relates to those facts and circumstances. For example, the advice must take into account the taxpayer's purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner. In addition, the requirements of this paragraph (c)(1) are not satisfied if the taxpayer fails to disclose a fact that

it knows, or should know, to be relevant to the proper tax treatment of an item.

(ii) *No unreasonable assumptions.* The advice must not be based on unreasonable factual or legal assumptions (including assumptions as to future events) and must not unreasonably rely on the representations, statements, findings, or agreements of the taxpayer or any other person. For example, the advice must not be based upon a representation or assumption which the taxpayer knows, or has reason to know, is unlikely to be true, such as an inaccurate representation or assumption as to the taxpayer's purposes for entering into a transaction or for structuring a transaction in a particular manner.

(2) *Advice defined.* Advice is any communication, including the opinion of a professional tax advisor, setting forth the analysis or conclusion of a person, other than the taxpayer, provided to (or for the benefit of) the taxpayer and on which the taxpayer relies, directly or indirectly, with respect to the imposition of the section 6662 accuracy-related penalty. Advice does not have to be in any particular form.

(3) *Cross-reference.* For rules applicable to advisors, see e.g., §§ 1.6694–1 through 1.6694–3 (regarding preparer penalties), 31 CFR 10.22 (regarding diligence as to accuracy), 31 CFR 10.33 (regarding tax shelter opinions), and 31 CFR 10.34 (regarding standards for advising with respect to tax return positions and for preparing or signing returns).

(d) *Pass-through items.* The determination of whether a taxpayer acted with reasonable cause and in good faith with respect to an underpayment that is related to an item reflected on the return of a pass-through entity is made on the basis of all pertinent facts and circumstances, including the taxpayer's own actions, as well as the actions of the pass-through entity.

(e) *Special rules for substantial understatement penalty attributable to tax shelter items of corporations—(1) In general; facts and circumstances.* The determination of whether a corporation acted with reasonable cause and in good faith in its treatment of a tax shelter item (as defined in § 1.6662–4(g)(3)) is based on all pertinent facts and circumstances. Paragraphs (e)(2), (3), and (4) of this section set forth rules that apply, in the case of a penalty attributable to a substantial understatement of income tax (within the meaning of section 6662(d)), in determining whether a corporation acted with reasonable cause and in good faith with respect to a tax shelter item.

(2) *Reasonable cause based on legal justification—(i) Minimum requirements.* A corporation's legal justification (as defined in paragraph (e)(2)(ii) of this section) may be taken into account, as appropriate, in establishing that the corporation acted with reasonable cause and in good faith in its treatment of a tax shelter item only if the authority requirement of paragraph (e)(2)(i)(A) of this section and the belief requirement of paragraph (e)(2)(i)(B) of this section are satisfied (the minimum requirements). Thus, a failure to satisfy the minimum requirements will preclude a finding of reasonable cause and good faith based (in whole or in part) on the corporation's legal justification.

(A) *Authority requirement.* The authority requirement is satisfied only if there is substantial authority (within the meaning of § 1.6662–4(d)) for the tax treatment of the item.

(B) *Belief requirement.* The belief requirement is satisfied only if, based on all facts and circumstances, the corporation reasonably believed, at the time the return was filed, that the tax treatment of the item was more likely than not the proper treatment. For purposes of the preceding sentence, a corporation is considered reasonably to believe that the tax treatment of an item is more likely than not the proper tax treatment if (without taking into account the possibility that a return will not be audited, that an issue will not be raised on audit, or that an issue will be settled)—

(1) The corporation analyzes the pertinent facts and authorities in the manner described in § 1.6662–4(d)(3)(ii), and in reliance upon that analysis, reasonably concludes in good faith that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged by the Internal Revenue Service; or

(2) The corporation reasonably relies in good faith on the opinion of a professional tax advisor, if the opinion is based on the tax advisor's analysis of the pertinent facts and authorities in the manner described in § 1.6662–4(d)(3)(ii) and unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged by the Internal Revenue Service. (For this purpose, the requirements of paragraph (c) of this section must be met with respect to the opinion of a professional tax advisor.)

(ii) *Legal justification defined.* For purposes of this paragraph (e), *legal justification* includes any justification relating to the treatment or characterization under the Federal tax



law of the tax shelter item or of the entity, plan, or arrangement that gave rise to the item. Thus, a taxpayer's belief (whether independently formed or based on the advice of others) as to the merits of the taxpayer's underlying position is a legal justification.

(3) *Minimum requirements not dispositive.* Satisfaction of the minimum requirements of paragraph (e)(2) of this section is an important factor to be considered in determining whether a corporate taxpayer acted with reasonable cause and in good faith, but is not necessarily dispositive. For example, depending on the circumstances, satisfaction of the minimum requirements may not be dispositive if the taxpayer's participation in the tax shelter lacked significant business purpose, if the taxpayer claimed tax benefits that are unreasonable in comparison to the taxpayer's investment in the tax shelter, or if the taxpayer agreed with the organizer or promoter of the tax shelter that the taxpayer would protect the confidentiality of the tax aspects of the structure of the tax shelter.

(4) *Other factors.* Facts and circumstances other than a corporation's legal justification may be taken into account, as appropriate, in determining whether the corporation acted with reasonable cause and in good faith with respect to a tax shelter item regardless of whether the minimum requirements of paragraph (e)(2) of this section are satisfied.

\* \* \* \* \*

**Michael P. Dolan,**

*Acting Commissioner of Internal Revenue.*

Approved: August 18, 1995.

**Leslie Samuels,**

*Assistant Secretary of the Treasury.*

[FR Doc. 95-21682 Filed 8-31-95; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 100

[CGD07 95-028]

RIN 2115-AE46

#### Special Local Regulations; City of Miami Beach, FL

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

**SUMMARY:** Special local regulations are being adopted for the Miami Offshore Grand Prix. The event will be held on September 3, 1995 from 11 a.m. EDT

(Eastern Daylight Time) until 3 p.m. EDT. The regulations are needed to provide for the safety of life on navigable waters during the event.

**EFFECTIVE DATE:** These regulations become effective on September 3, 1995 at 10:30 a.m. EDT and terminate at 3:30 p.m. EDT that day. In the event of inclement weather, an alternate rain date of September 4, 1995 is established with these same times.

**ADDRESSES:** The Environmental Assessment and Finding of No Significant Impact for this rulemaking are available for inspection and copying at Coast Guard Group Miami, 100 MacArthur Causeway, Miami Beach, Florida.

**FOR FURTHER INFORMATION CONTACT:** LTJG B. E. Dailey, Coast Guard Group Miami, Florida at (305) 535-4492.

**SUPPLEMENTARY INFORMATION:** In accordance with 5 U.S.C. § 553, a notice of proposed rulemaking has not been published for these regulations. Following normal rulemaking procedures would have been impracticable, as there was not sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date.

#### Drafting Information

The drafters of these regulations are LTJG Bryan E. Dailey, Project Officer, USCG Group Miami, and LT Jacqueline Losego, Project Attorney, Seventh Coast Guard District Legal Office.

#### Discussion of Regulations

Offshore Power Boat Racing Association, is sponsoring a high speed power boat race with approximately sixty-five (65) race boats, ranging in length from 24 to 50 feet, participating in the event. There will be approximately two hundred (200) spectator craft. The proposed race course includes Government Cut, Miami, Florida, and the Atlantic Ocean offshore Miami Beach, Florida. The race boats will be competing at high speeds with numerous spectator craft in the area, creating an extra or unusual hazard in the navigable waterways.

#### Regulatory Evaluation

This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of

Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. Entry into the regulated area is prohibited for only 5 hours on the day of the event.

Since the impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

#### Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environmental Assessment

The Coast Guard has considered the environmental impact of this action consistent with Section 2.B. of Commandant Instruction M16475.1B. In accordance with that section, this action has been environmentally assessed (EA completed), and the Coast Guard has determined that it will not significantly affect the quality of the human environment. An environmental assessment and finding of no significant impact has been prepared and are available for inspection and copying from LTJG B. Dailey, Coast Guard Group Miami, Florida, (305) 535-4492. As a condition to the permit, the applicant is required to educate the event participants regarding the possible presence of manatees and the appropriate precautions to take if the animals are sighted.

#### List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

#### Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233, 49 CFR 1.46 and 33 CFR 100.35.

2. A temporary section 100.35-T07-028 is added to read as follows:

#### § 100.35-T07-028 City of Miami Beach, FL.

##### (a) *Regulated Area:*

(1) The regulated area begins from that portion of Miami Main Channel at approximate position 25°45'57" N, 080°08'42" W, thence to the southern entrance to the Miami Beach Marina